Supreme Court, U.S.
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No. 09-1409

In the Supreme Court of the United States

JOHN J. WARREN and JAMES K. WARREN,
Petitioners,

v.

FEDERAL INSURANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition, where the District Court's discovery rulings on the scope and timing of discovery that were affirmed by the Sixth Circuit's Opinion under the abuse of discretion standard of review comport with a trial court's broad discretion to control the scope and timing of discovery, and where such decisions were in accordance with the Federal Rules of Civil Procedure, as well as with numerous decisions from the Sixth Circuit, Ohio and sister jurisdictions that have considered similar issues.

2. Whether Petitioners have presented a compelling reason to grant the Petition, where the Sixth Circuit Opinion affirming summary judgment to Respondent comports with well-established Ohio Supreme Court case law, and where the decision involves the application of a defined policy term to the specific language employed in a particular letter.

RULE 29.6 DISCLOSURE STATEMENT

The Chubb Corporation is a publicly traded company whose shares are traded on the NYSE under the symbol "CB". The Chubb Corporation is the only publicly held company that owns 10% or more of Federal Insurance Company's stock.

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STATEMENT OF THE CASE

Background Facts

This action is an insurance coverage dispute between Petitioners, John and James Warren ("Petitioners") and Federal Insurance Company ("Respondent") under the terms, conditions and exclusions of a policy (the "Policy") that Respondent issued to BIS Holdings, LLC ("BISH").

Petitioners, through a limited liability company, collectively owned fifty percent (50%) of BISH. Prime Measurement Products, LLC ("Prime") was a wholly owned subsidiary of BISH. In February 2004, Prime obtained a revolving line of credit from PNC Bank. Petitioners signed a $700,000 personal guaranty on that line of credit. The personal guaranty contained a cognovit provision that allowed the bank to enter a judicial confession of judgment against Petitioners in the event that Prime defaulted on the line of credit.

In May 2005, Petitioners sold their interests in BISH to the other owner of BISH. Petitioners also resigned as officers and directors of BISH and Prime. Shortly thereafter, PNC Bank notified Petitioners that events of default had occurred relating to the revolving line of credit. PNC Bank demanded that Petitioners fulfill their obligations under the personal guaranty. Petitioners refused.

PNC Bank filed a Complaint Upon Cognovit Guaranty against Petitioners pursuant to the terms of the personal guaranty that Petitioners had executed in favor of PNC Bank, and confessed judgment against Petitioners in the amount of $700,000 (the "Underlying

Action"). There were no allegations in the complaint relating to any misrepresentations or other improper or negligent actions on the part of Petitioners. Petitioners immediately filed Motions to Vacate and Stay Execution on the Cognovit Judgment.

More than two months after PNC Bank obtained the $700,000 judgment against Petitioners, Petitioners attempted to obtain coverage for the Underlying Action (and the judgment obtained therein) under the terms, conditions and exclusions of the Policy.

Petitioners premised their attempt to transform the Underlying Action into a covered D&O Claim (which is a term that is expressly defined in the Policy) upon two sentences contained in a letter dated March 22, 2006 from PNC Bank's counsel (the "March 22, 2006 Letter"), which read:

> In addition to your clients' liability to PNC as set forth above (under the guaranty and with respect to the purchase of their interests in BIS Holdings) we believe that [Petitioners] were responsible for misrepresentations regarding Prime's inventory which affected (a) the borrowing base certificates provided to PNC, and (b) Prime's financial statements upon which PNC relied. *We currently are evaluating PNC's rights and remedies with respect to these misrepresentations.* (emphasis added).

Contrary to Petitioners' assertion on page 4 of their Petition that they sought coverage for only the purported malfeasance claim, a May 16, 2006 letter from Petitioner's counsel asserted that Respondent

"should step in to provide defense counsel for [Petitioners] in their current lawsuit with PNC."

On May 17, 2006, Respondent requested that Petitioners' counsel provide Respondent with certain documentation concerning the litigation on the personal guaranty and also specifically requested "copies of any and all correspondence regarding the matters referenced in [PNC Bank's] March 22, 2006 Letter." On May 19, 2006, Petitioners' counsel provided Respondent with documents concerning litigation on the personal guaranty, but did provide any other correspondence from PNC Bank regarding the matters referenced in the March 22, 2006 Letter.

By letter dated August 8, 2006, Respondent informed Petitioners that it had reviewed the Policy in light of the information provided to date and further informed Petitioners that their request for coverage of the Underlying Action was denied.

On June 27, 2007, Petitioners and PNC Bank entered into the Settlement Agreement and Petitioners paid PNC Bank $350,000, which amount is equal to half of PNC Bank's $700,000 Cognovit Judgment against Petitioners (the "Settlement Agreement"). In the Settlement Agreement, Petitioners and PNC Bank allocated $300,000 of the $350,000 payment to "claims asserted by PNC . . . for accounting irregularities. . . ." and just $50,000 to the personal guaranty upon which PNC Bank had already obtained a $700,000 judgment.

The District Court Proceedings

On November 2, 2007, Petitioners commenced an action against Respondent (the "Coverage Action").

Petitioners did not limit their claims in the Coverage Action to the alleged malfeasance claim, as Petitioners suggest on page 5 of their Petition. Rather, Petitioners asserted two coverage causes of action: a claim for breach of contract and a claim seeking a declaration that Respondent had a duty to defend and indemnify Petitioners under the Policy for the claims that PNC Bank actually raised or could have raised in the Underlying Action. Additionally, Petitioners asserted a claim for bad faith against Respondent.

In the parties' Rule 26(f) conference, counsel for Petitioners and Respondent extensively discussed whether Petitioners' bad faith claim should be bifurcated and stayed pending resolution of Petitioners' coverage claims. Prior to the conference, Respondent's counsel provided Petitioners' counsel with a plethora of Ohio decisions in which this procedure was employed. Nonetheless, Petitioners' counsel did not agree to this proposed plan. As a result, the parties' respective positions on the proposed bifurcation and discovery plan were set forth in the Rule 26(f) Report filed with the District Court and were extensively discussed during the Case Management Conference. After hearing from both sides, the District Court agreed that the bad faith claim would be bifurcated and stayed, and the parties thereafter agreed with the District Court that they would complete any necessary discovery on the coverage claims by May 1, 2008 and submit their motions for summary judgment on the coverage claims by June 1, 2008. These agreements are memorialized in the District Court's Case Management Order.

Petitioners issued written discovery on February 19, 2008. Despite the District Court's Case

Management Order limiting the scope of discovery, the majority of Petitioners' written discovery sought information relevant only to the bad faith claim (which was stayed) and/or extrinsic evidence regarding how Respondent interpreted the Policy and the written documents submitted to Respondent, which is inadmissible absent a finding of ambiguity. Additionally, on May 1, 2008 (i.e., the last day of discovery), Petitioners filed a Motion to Extend, in which Petitioners sought to extend the discovery deadline so that they could depose Respondent about Respondent's handling of the claim and why it chose to deny coverage, as well as to obtain deposition testimony from Respondent about the Policy and how Respondent interprets the Policy. (Petitioners' Sixth Circuit Principal Brief, pp. 41, 44; Pet. 10).

On that same day, Respondent filed a Motion for Protective Order to postpone and/or preclude such depositions unless and until the District Court determined that the applicable written documents (i.e., the Policy, the complaint in the Underlying Action and the March 22, 2006 letter) were ambiguous. As Respondent explained, Petitioners' deposition topics related to the Petitioners' claim for bad faith (which was bifurcated and stayed and does not survive under Ohio law absent a coverage decision in the Petitioners' favor) or to extrinsic evidence of one party's interpretation of written documents, which is not admissible evidence absent a finding of ambiguity. On May 28, 2008, after the parties fully briefed their respective motions, the Court granted Respondent's Motion and denied Petitioners' Motion to Extend.

Respondent filed its Motion for Summary Judgment two days later, on May 30, 2008.

Petitioners filed their Motion for Partial Summary Judgment on June 2, 2008.

On August 21, 2008, the District Court granted summary judgment to Respondent. The District Court determined that the March 22, 2006 Letter is not a D&O Claim as that term is expressly defined in the Policy because the plain language of the March 22, 2006 Letter does not contain a demand for monetary damages as required for coverage under the Policy. (Pet. App. 24a). Additionally, the District Court noted that the language of the March 22, 2006 Letter "plainly provides that PNC is 'currently evaluating' its rights and remedies." (Pet. App. 24a). As the District Court explained, if PNC Bank was "currently evaluating" its rights, it logically follows that PNC Bank had not yet made a demand in that the two concepts are mutually exclusive. (Pet. App. 24a).[1]

The Sixth Circuit Appeal

Petitioners appealed the District Court's summary judgment decision to the Sixth Circuit Court of Appeals. Additionally, Petitioners appealed the District Court's Order bifurcating and staying the bad faith claim pending resolution of the coverage claims. Finally, Petitioners' appealed the District Court's May 28, 2008 Order granting Respondents' Motion for Protective Order.

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[1] Contrary to Petitioners' contention on page 5 of their Petition, the District Court did not base its decision on reliance of the affidavit of Michael Joyce. Indeed, that affidavit is not mentioned at all in the District Court's summary judgment opinion.

Petitioners wrongly characterize the May 28, 2008 Order as the District Court's "preclusion of allowing the Petitioners to take any and all depositions." (Pet. 5-6). The May 28, 2008 Order did no such thing. Rather, in accordance with the District Court's broad and inherent discretion to manage the timing and scope of discovery for matters on its docket, the District Court Order, which was entered just a few days before the parties filed their cross-motions for summary judgment, simply directed that depositions of Respondent would be postponed and/or precluded unless and until the Court determined that an ambiguity existed in any of the applicable written documents (i.e., the Policy, the complaint in the Underlying Action, or the March 22, 2006 Letter).

The Sixth Circuit received extensive appellate briefs from each of the parties and also granted Petitioners' request for oral argument. After due consideration, the Sixth Circuit affirmed both of the District Court's decisions limiting the timing and scope of discovery. The Sixth Circuit's Opinion reviewed these decisions under the abuse of discretion standard of review, which is the appropriate standard of review. Likewise, the Sixth Circuit Opinion appropriately cited two Sixth Circuit decisions that are directly on point.

The Sixth Circuit also affirmed the District Court's grant of summary judgment to Respondent. In an apparent effort to sway this Court, Petitioners negatively characterize the Sixth Circuit panel as "three judges, none of them from Ohio." (Pet. 7). This case was heard by a distinguished panel of Sixth Circuit Judges, who collectively hold over sixty years of judicial experience in the district and appellate courts of the Sixth Circuit. Petitioners also contend

that the Sixth Circuit "simply refused to follow Ohio law as determined by the Ohio Supreme Court" and instead "created a new standard of review for insurance contract interpretation." (*Id.*). Again, Petitioners have got it wrong. The Sixth Circuit's Opinion correctly interpreted and applied the plain and unambiguously-defined terms and conditions of the Policy to the plain language of the March 22, 2006, in accordance with long-standing Ohio Supreme Court case law.

Based on these facts, and as explained more fully below, Petitioners simply have not established any compelling reason under Supreme Court Rule 10 to grant their Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit Properly Used The Abuse Of Discretion Standard Of Review And Existing Circuit Precedent To Affirm The District Court's Rulings Regarding The Timing And Scope Of Discovery, and the Sixth Circuit's Opinion Is Not In Conflict With The Decisions Of Another United States Court Of Appeals On The Same Matter Or With Any Relevant Decision Of This Court.

Federal Rules of Civil Procedure 16, 26, and 42(b) provide the District Court with broad discretion to manage its docket, as well as the timing and scope of discovery. Additionally, "it is well established that the scope of discovery is within the sound discretion of the trial court." *United States v. Guy*, 978 F.2d 934, 938 (6th Cir. 1992), quoting *Criss v. City of Kent*, 867 F.2d

259, 261 (6th Cir.1988) (quoting *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir.), *cert. denied*, 454 U.S. 893, 102 S.Ct. 388, 70 L.Ed.2d 207 (1981)).

The Sixth Circuit Court of Appeals also has consistently held that "trial courts have the broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are resolved." *Gettings v. Building Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300, 304-05 (6th Cir. 2003), quoting *Hahn v. Star Bank*, 190 F.3d 708, 719 (6th Cir. 1999)(citing *Landis v. North Am. Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 81 L.Ed. 153 (1936)); *Smith v. Allstate Ins. Co.*, 403 F.3d 401, 407 (6th Cir. 2005).

A district court's decision to limit discovery is reviewed by the appellate court under an abuse of discretion standard. *Gettings v. Building Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300, 304-05 (6th Cir. 2003). Abuse of discretion means that the appellate court is left with a "definite and firm conviction that the court below committed a clear error of judgment." *Guy*, 978 F.2d at 938, citing *Taylor v. United States Parole Commission*, 734 F.2d 1152, 1155 (6th Cir. 1984) (quoting *Balani v. Immigration and Naturalization Service*, 669 F.2d 1157, 1160 (6th Cir. 1982)).

In this case, the Sixth Circuit's Opinion correctly concluded that the District Court's rulings on bifurcation, as well as staying certain discovery, were to be reviewed under the abuse of discretion standard. (Pet. App. 15(a)). Likewise, the Sixth Circuit appropriately cited both *Smith v. Allstate Ins. Co.*, 403

F.3d 401, 407 (6th Cir. 2005) and *Gettings v. Building Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300, 304-05 (6th Cir. 2003) to support its conclusion to affirm the District Court's discovery decisions under the abuse of discretion standard of review. (Pet. App. 15(a)).

In *Smith v. Allstate Ins. Co.*, the Sixth Circuit affirmed the district court's decision to bifurcate the coverage claim and the bad faith claim, and to stay discovery as to the bad faith claim pending disposition of the coverage claim. *Smith v. Allstate Ins. Co.*, 403 F.3d 401, 407 (6th Cir. 2005). The *Smith* Court held that "because the merits of the bad faith claim depended on whether the limitations provision [contained in the policy] was valid, it was reasonable for the court to resolve the validity question before allowing the bad faith claim to proceed." *Id.*

The Sixth Circuit's citation of the *Smith* decision in this case is particularly appropriate because one of the discovery rulings that the Sixth Circuit was reviewing was the District Court's ruling that bifurcated and stayed Petitioners' bad faith claim pending resolution of Petitioners' coverage claims against Respondent.

In *Gettings v. Building Laborers Local 310 Fringe Benefits Fund*, the Sixth Circuit affirmed the district court's decision to stay discovery pending resolution of the defendant's summary judgment motion. *Gettings v. Building Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300, 304-05 (6th Cir. 2003), citing *Muzquiz v. W.A. Foote Memorial Hosp., Inc.*, 70 F.3d 442, 430 (6th Cir. 1995). The *Gettings* Court held that because the motion for summary judgment contained several issues that could be decided as a matter of law, "the

district court did not abuse its discretion in making these legal determinations without discovery." *Id.*

The Sixth Circuit's citation of the *Gettings* decision in this case also is particularly appropriate because the other discovery ruling that the Sixth Circuit was reviewing in this case was the District Court's grant of Respondent's motion to postpone and/or preclude the deposition of Respondent pending the court's ruling on the upcoming motions for summary judgment. If the District Court determined, via the cross-motions for summary judgment, that the applicable written documents (i.e., the Policy, the complaint in the Underlying Action and the March 22, 2006 Letter) were unambiguous, then extrinsic evidence relating to any of the parties' interpretations of those documents would be unnecessary and inadmissible.

Finally, the Sixth Circuit's decision in this case is not in direct conflict with the Fifth Circuit's decision in *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979), as Petitioners' suggest in their Petition. (Pet. 11). The *Salter* Court reviewed a protective order that required the plaintiff to depose individuals with more knowledge of the relevant facts before deposing the corporation's president. *Salter*, 593 F.2d 649, 651 (5th Cir. 1979). The *Salter* Court held that "we do not interpret this ruling as totally prohibiting plaintiff from taking [the president's] deposition. Rather, the trial judge was merely exercising the broad discretion that this court has long recognized he has in controlling the timing of discovery." *Id.*, citing *Scroggins v. Air Cargo, Inc.*, 534 F.3d 1124 (5th Cir. 1976).

That rationale is equally applicable in this case, where the District Court simply exercised its broad discretion in the timing of discovery by ruling that depositions of the Respondent would be postponed and/or precluded pending the Court's ruling on the upcoming motions for summary judgment. Moreover, like the Sixth Circuit in this case, the *Salter* Court affirmed the district court's discovery decision. *Id.* Thus, the *Salter* decision does not conflict with the Sixth Circuit's decision in this case in either its rationale or its result.[2]

Accordingly, the Sixth Circuit's Opinion affirming the District Court's discovery decisions is not in conflict with the decisions of another United States court of appeals on the same matter within the meaning of the first criteria of Supreme Court Rule 10(a).[3] Likewise, the Sixth Circuit's Opinion does not conflict with any relevant decision of this Court within the meaning of Supreme Court Rule 10(c).

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[2] Instead of relying on the holding in *Salter*, Petitioners base their conflict argument on the following dicta that appears in the *Salter* decision: "[i]t is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such order would likely be in error." *See Salter*, 593 F.2d at 651.

[3] Petitioners also suggest that the Sixth Circuit's decision in this case conflicts with another decision by the Sixth Circuit, *Conti v. Am. Axle and Mfg., Inc.*, 326 Fed. Appx. 900 (6th Cir. 2009). However, an intra-circuit conflict simply is not one of the bases cited in Supreme Court Rule 10 as a compelling reason for granting a Petition.

II. The Sixth Circuit's Opinion Affirming The District Court's Decision To Postpone And/Or Preclude Certain Discovery Pending The District Court's Ruling On Summary Judgment Does Not Conflict With The Ohio Supreme Court's Decisions On Contract Interpretation And Parol Evidence.

The Sixth Circuit's Opinion also does not conflict with the applicable Ohio Supreme Court's decisions. It is well established by the Ohio Supreme Court that the construction of a written contract is a matter of law to be determined by the court. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. "If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined." *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 652 N.E.2d 684, 686 (1995).

Moreover, where the terms in a contract are clear and unambiguous, the court cannot create a new agreement by finding a different intent from that which is expressed in the clear language of the contract. *Alexander*, 374 N.E.2d at 146; *Jackson v. Metropolitan Life Ins. Co.*, 34 Ohio St.2d 138, 140, 296 N.E.2d 679, 681 (1973); *Blosser v. Enderlin*, 113 Ohio St. 121, 148 N.E. 393 (1925), paragraph one of the syllabus. Indeed, "it is unnecessary and impermissible for a court to resort to construction of that language." *Kraban v. State Auto. Mut. Ins. Co.*, 10 Ohio St.3d 163, 462 N.E.2d 403, 406 (1984). Put differently, when the terms of an insurance policy are plain and unambiguous, parol evidence is not admissible to

contradict unambiguous contract terms or to attempt to create an ambiguity in the first instance. *Fidelity & Casualty Ins. Co. v. Hartzell Bros. Co.*, 109 Ohio St. 566, 143N.E. 137 (1924), syllabus.

In this case, the District Court's resolution of the Petitioners coverage claims for breach of contract and declaratory judgment involved the Court's interpretation of contract terms that are expressly defined in the Policy, and the Court's determination of whether written documents (that are the best evidence of their terms) satisfied such defined Policy terms. Such determinations are made by the Court as a matter of law. Moreover, as explained above, when the terms in the contract are clear, the Ohio Supreme Court has repeatedly held that it is impermissible to admit parol evidence to contradict unambiguous contract terms or to create an ambiguity in the first instance.

Accordingly, the Sixth Circuit's Opinion affirming the District Court's discovery decisions also is not in conflict with a decision by a state court of last resort within the meaning of the second criteria of Supreme Court Rule 10(a).

III. The Sixth Circuit Has Not Departed From The Accepted And Usual Course Of Judicial Proceedings, Or Sanctioned Such Departure By The District Court As To Call For The Exercise Of This Court's Supervisory Power.

Finally, the Sixth Circuit has not departed so far from the accepted and usual course of judicial proceedings, or sanctioned such departure by the

District Court as to call for the exercise of this Court's supervisory power under the third and final criteria of Supreme Court Rule 10(a). If anything, it was Petitioners who repeatedly attempted to circumvent the District Court's discovery rulings and who did not comply with the accepted and usual course of the judicial proceedings.

A. Petitioners did not comply with the accepted and usual course of judicial proceedings in this case.

On the last day of discovery (i.e., May 1, 2008) and thirty days before the summary judgment deadline, Petitioners filed a Motion to Extend in which Petitioners sought to extend the discovery deadline so that they could depose Respondent about Respondent's handling of the claim and why it chose to deny coverage, as well as to obtain deposition testimony from Respondent about the Policy and how Respondent interprets the Policy. (Petitioners' Sixth Circuit Principal Brief, pp. 41, 44; Petitioners' Pet. p. 10; Respondent's Sixth Circuit Designation of Record at R. 14, R. 15 and R.15-2). Petitioners' actions caused Respondent to immediately file a Motion for Protective Order to postpone and/or preclude the depositions unless or until the District Court determined that the Policy or applicable written documents (i.e., the complaint in the Underlying Action or the March 22, 2006 Letter) were ambiguous. (Respondent's Sixth Circuit Designation of Record at R. 15 and R.15-2).

As Respondent explained in its Memorandum in Support of its Motion for Protective Order to postpone and/or preclude such depositions, which it incorporated by reference in its Memorandum in Opposition to

Petitioner's Motion to Extend, Petitioners had previously issued numerous document requests related only to the Petitioners' bad faith claim. Thus, Petitioners were issuing discovery in contravention of the District Court's prior Order bifurcating and staying the bad faith claim. (*Id.*).

Additionally, Respondent explained that the Petitioners' deposition topics also related to the Petitioners' claim for bad faith (which was bifurcated and stayed and does not survive under Ohio law absent a coverage decision in the Petitioners' favor) or to extrinsic evidence of one party's interpretation of written documents. (*Id.*). Respondent further established that Petitioners' attempt to obtain parol evidence regarding the interpretation of such Policy terms before the District Court determined as a matter of law whether the Policy terms were clear or ambiguous is exactly the type of evidence that is precluded by the Ohio Supreme Court case law cited above. (*Id.*).

Respondent also established how Petitioners' failure to honor the District Court's Case Management Order as to the scope and timing of discovery was causing disruption, delay, unnecessary burdens and expense to Respondent. (*Id.*). Based on these reasons, Respondent suggested that the appropriate course of action was for the District Court to deny the Motion to Extend and to postpone and/or preclude the depositions until after the District Court determined whether the applicable Policy terms or written documents were clear or ambiguous pursuant to the parties' upcoming cross-motions for summary judgment. (*Id.*; Opp. to Mot. To Extend, p. 16).

Accordingly, after the parties each had the opportunity to fully brief the facts and the applicable law for the District Court, the District Court denied Petitioners' Motion and granted Respondent's Motion by separate text orders each dated May 28, 2008. (Respondent's Sixth Circuit Designation of Record at May 28, 2008 Text Orders)

B. The Sixth Circuit and the District Court did not depart from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's supervisory power under the third and final criteria of Supreme Court Rule 10(a).

The District Court's decision to grant Respondent's Motion to postpone or preclude the deposition unless or until the District Court determined that the Policy or applicable written documents were ambiguous is in accordance with the Ohio Supreme Court case law cited in Section II of this Brief. The District Court's decision also is in accord with the prior decisions from courts in Ohio as well as numerous other jurisdictions, which have already determined that the preferred, if not required procedure is to first determine whether there are ambiguities before conducting discovery to develop extrinsic evidence about the parties' intent. *Toledo Lucas County Port Authority v. Axa Marine & Aviation Ltd.*, No. 3:99CV7320, 2004 WL 2203750 **2-3 (N.D. Ohio, Sept. 28, 2004) (denying motion to compel discovery of extrinsic evidence unless and until court determines that policy is ambiguous and stating that affidavits purporting to explain, interpret or construe policy language will not be considered by the court in determining whether policy is ambiguous);

Rhone Poulenc Rorer Inc. v. The Home Indem. Co., 139 F.R.D. 609, 612 (E.D. Pa. 1991)(denying motion to compel discovery of extrinsic evidence and holding that the appropriateness of such discovery should not even be an issue unless and until there has been a finding by the District Court that one or more of the provisions in the insurance policy at issue is ambiguous), *Missouri Pac. R.R. v. Aetna Cas. & Surety Co.*, No. 3-93-CV-1898-D, 1995 WL 861146 at *2 (N.D. Tex. May 17, 1995)(same); *Oklahoma Pub. Co. v. Continental Ins. Co.*, No. CIV-90-1251-A, 1991 WL 323804 at *1 (W.D. Okla. Nov. 5, 1991)(same).

Furthermore, the District Court's decision to postpone the depositions just makes good common sense from a case management perspective. As explained by the court in *Toledo Lucas*: "[i]f the [issues] can be resolved by examining the policies, and if the terms and conditions of the policies can be understood without uncertainty as to their meaning, the need for discovery will have been reduced substantially, if not eliminated entirely." *Toledo-Lucas*, 2004 WL 2203750 at **8-9.

For the foregoing reasons, Respondent respectfully submits that the Sixth Circuit's Opinion appropriately affirmed the District Court's discovery rulings under the abuse of discretion standard of review because the District Court's rulings comport with its broad discretion to control the scope and timing of discovery. Such rulings also were in accordance with the Federal Rules of Civil Procedure, as well as with numerous decisions from the Sixth Circuit, Ohio and sister jurisdictions that have considered similar issues. As such, Petitioners have failed to establish that the Sixth Circuit "so far departed from the accepted and usual

course of judicial proceedings, or sanctioned such departure by the District Court" within the meaning of the third and final criteria of Supreme Court Rule 10(a).

In sum, for the reasons set forth in Sections I-III of this Opposition Brief, Respondent submits that Petitioners have failed to establish any compelling reason to grant their Petition[4] with respect to the Sixth Circuit's Opinion affirming the District Court's May 28, 2008 Order involving the scope and timing of discovery.

IV. Petitioners Disagreement With The Manner In Which The Sixth Circuit Applied Well-Established Ohio Supreme Court Case Law To Affirm The District Court's Decision Granting Summary Judgment To Respondent Is Not A Compelling Reason To Grant The Petition Under Supreme Court Rule 10.

Petitioners assert on pages 11 and 12 of their Petition that the Sixth Circuit's Opinion "changed over 85 years of Ohio precedent by throwing out the Ohio Supreme Court's well-established rules of interpretation for insurance contracts" and "improperly disregarded the Ohio Supreme Court's precedent, which controlled the resolution of this case, to reach its desired result." In the Petition, however, Petitioners exclude all of the Ohio Supreme Court

[4] Supreme Court Rule 10(b), which pertains to petitions involving appeals of decisions by a state court of last resort, is not applicable to this Petition.

precedents on contract interpretation and parol evidence (which also date back to as early as 1924) that *fully support* the Sixth Circuit's Opinion.

The Ohio Supreme Court decisions that Petitioners exclude in their Petition establish that where the relevant terms of a contract, including a contract of insurance, are plain and unambiguous, the court applies the plain meaning of the contract term as a matter of law; parol evidence is not admissible to contradict unambiguous contract terms or to attempt to create an ambiguity in the first instance. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 652 N.E.2d 684, 686 (1995); *Krabin v. State Auto. Mut. Ins. Co.*, 10 Ohio St.3d 163, 462 N.E.2d 403, 406 (1984); *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus; *Jackson v. Metropolitan Life Ins. Co.*, 34 Ohio St.2d 138, 140 296 N.E.2d 679, 681 (1973); *Blosser v. Enderlin*, 113 Ohio St. 121, 148 N.E. 393 (1925), paragraph one of the syllabus; and *Fidelity & Casualty Ins. Co. v. Hartzell Bros. Co.*, 109 Ohio St. 566, 143N.E. 137 (1924), syllabus. This case law was cited in Respondent's briefs in the lower courts and is also more fully discussed in Sections II and V of Respondent's Brief in Opposition to the Petition.

Thus, although Petitioners have framed this portion of their appeal as a failure by the Sixth Circuit to follow the *Erie* Doctrine, that is not true. The Sixth Circuit's Opinion is entirely consistent with the well established Ohio Supreme Court precedent cited above. In reality, Petitioners simply disagree with the Sixth Circuit's application of well-established Ohio law. However, even if the Sixth Circuit misapplied

Ohio state law, (which is not the case), Petitioners' dissatisfaction with the appellate court's application of state law is not a sufficient reason to grant the Petition. Indeed, Supreme Court Rule 10 clearly states that a Petition is rarely granted when the error alleged by the Petitioner is the misapplication of a properly stated rule of law.

Accordingly, Petitioners have failed to provide a compelling reason to grant their Petition with respect to the Sixth Circuit's Opinion affirming summary judgment to Respondent.

V. The Sixth Circuit's Opinion Affirming The District Court's Grant Of Summary Judgment To Respondent Was Correctly Decided On The Basis Of Long-Standing Ohio Supreme Court Case Law And The Actual Language Of The Specific Letter At Issue In This Case.

It is well-established by the Ohio Supreme Court that the construction of a written contract is a matter of law to be determined by the court. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. If a contract is clear and unambiguous, then its interpretation is a matter of law. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 652 N.E.2d 684, 686 (1995), *Alexander*, 374 N.E.2d at 146 and paragraph one of the syllabus.

Moreover, where the terms in a contract are clear and unambiguous, the court cannot create a new agreement by finding a different intent from that which is expressed in the clear language of the

contract. *Alexander* 374 N.E.2d at 146; *Jackson v. Metropolitan Life Ins. Co.*, 34 Ohio St.2d 138, 140, 296 N.E.2d 679, 681 (1973); *Blosser v. Enderlin*, 113 Ohio St. 121, 148 N.E. 393 (1925), paragraph one of the syllabus. Indeed, "it is unnecessary and impermissible for a court to resort to construction of that language." *Krabin v. State Auto. Mut. Ins. Co.*, 10 Ohio St.3d 163, 462 N.E.2d 403, 406 (1984). Put differently, when the terms of an insurance policy are plain and unambiguous, parol evidence is not admissible to contradict unambiguous contract terms or to attempt to create an ambiguity in the first instance. *Fidelity & Casualty Ins. Co. v. Hartzell Bros. Co.*, 109 Ohio St. 566, 143N E. 137 (1924), syllabus.

In this case, Petitioners argued that a letter dated March 22, 2006 from PNC Bank to Petitioners constituted a "written demand for monetary damages" under subpart (a) of the Policy definition of "D&O Claim." A "D&O Claim" is defined in the Policy, in relevant part, as a:

> (a) *written demand for monetary damages* or non-monetary relief;
>
> (b) a civil proceeding commenced by the service of a complaint or similar pleading
>
> * * *
>
> Against an insured for a Wrongful Act, including any appeal therefrom.

(Pet. App. 9a, quoting Policy Definition I(D)(1)(a), (b), emphasis in opinion)

The relevant portion of the March 22nd letter provides:

> [W]e believe that the [Petitioners] were responsible for misrepresentations regarding Prime's inventory which affected (a) the borrowing base certificates provided to PNC, and (b) Prime's financial statements upon which PNC relied. *We are currently evaluating PNC's rights and remedies with respect to these misrepresentations.*

(Pet. App. 9a, quoting March 22, 2006 letter, emphasis supplied). Both the District Court and the Sixth Circuit determined that the March 22nd letter is not a D&O Claim as that term is defined in the Policy because "the plain language of the March 22nd letter does not contain a demand for monetary damages as required for coverage under the [P]olicy." (Pet. App. 9a).

As explained by both the District Court and the Sixth Circuit, PNC Bank could not be "currently evaluating" its rights and remedies and "making a claim for monetary damages" because the two concepts are mutually exclusive. (Pet. App. 9a).

Additionally, while Petitioners pointed to other cases where courts were required to determine whether a letter satisfied the definition of a claim, the Sixth Circuit agreed with the District Court that those cases were inapposite because the language of the letters in those cases was decidedly different from the language of the March 22, 2006 letter. (Pet. App. 9a-10a).

In accordance with the Ohio Supreme Court precedent on contract interpretation and parol evidence, the Sixth Circuit also properly determined that Petitioners could not use extrinsic, "after-the-fact evidence," none of which Respondent received before denying coverage, to convert the March 22nd letter into a "written demand for monetary damages" so as to satisfy the D&O Claim definition of the Policy. (Pet App. 11a).

Finally, in accordance with Ohio Supreme Court precedent on contract interpretation, the Sixth Circuit correctly held that Petitioners did not satisfy the reporting provisions of the Policy by simply informing Respondent that PNC Bank's evaluation of its rights and remedies was underway and might lead to more claims against Petitioners. The Sixth Circuit properly determined that reporting a *potential* claim under Section VII(A)(2) of the Policy did not eliminate Petitioners' contractual obligation under the express language of Section VII(A)(1) of the Policy to report an *actual* D&O Claim if and when it arose:

> The policy provisions on notice and reporting ensure that [Respondent] has the necessary information to evaluate whether coverage is warranted when a policyholder makes a claim. [Petitioners] concede it was 'a very fluid situation' between them and PNC during the time in question ([Petitioner's Sixth Circuit Brief] at 25), but yet they did not keep [Respondent] apprised of all of the circumstances and correspondence regarding the situation despite [Respondent's] request in its May 17 letter that [Petitioners] provide all relevant correspondence regarding the litigation

> with PNC Bank. The changing nature of the situation did not absolve [Petitioners] from giving [Respondent] actual notice of the claim and ensuring that [Respondent] had all of the details of the 'very fluid' situation.

(Pet. App. 12a-14a)

Based on the foregoing, it is clear that the Sixth Circuit did not "create a new standard of insurance contract interpretation," as Petitioners' suggest in their Petition. Rather, the Sixth Circuit' Opinion correctly interpreted the plain and unambiguously defined terms and conditions of the Policy and the plain language of the March 22, 2006 Letter in accordance with long-standing Ohio Supreme Court case law.

Moreover, the ultimate conclusion reached by the District Court and the Sixth Circuit was based on the specific language contained in the March 22, 2006 Letter. However, letters are not fungible items, but can and do differ significantly. Thus, as was made clear by the Sixth Circuit, whether any particular letter satisfies the definition of a D&O Claim would have to be determined by reviewing the actual language of the letter and applying it to the plain definition of D&O Claim used in the Policy. It necessarily follows that the impact of the Sixth Circuit's decision in this case does not extend beyond the narrow interests of Petitioners and Respondent.

Based on the foregoing reasons, Petitioners have failed to establish a compelling reason for this Court to grant their Petition with respect to the Sixth Circuit's Opinion affirming summary judgment to Respondent.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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